

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ORLANDO BARDWELL,

Defendant-Appellee.

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UNPUBLISHED

May 15, 2012

No. 306726

Ingham Circuit Court

LC No. 09-001064-FH

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

The People of the State of Michigan appeal by leave granted from an order granting Orlando Bardwell's petition to withdraw his guilty plea for aggravated indecent exposure.<sup>1</sup> We reverse and remand.

Bardwell was observed in a school parking lot wearing only a shirt and shoes, fondling his exposed genitals and masturbating. He was caught by the police a short distance away. Bardwell pleaded guilty to one count of aggravated indecent exposure,<sup>2</sup> second offense.<sup>3</sup> In exchange for his plea, the prosecution agreed to dismiss the habitual offender - fourth offense notice<sup>4</sup> and take no position regarding sentencing. Bardwell was sentenced to 180 days in jail, which was held in abeyance pending his successful completion of 36 months' probation. Bardwell acknowledged at sentencing that he understood that he was required to register as a sex offender and comply with the requirements of the Sex Offender Registration Act (SORA).<sup>5</sup>

Bardwell subsequently filed a petition to withdraw his guilty plea, arguing that his plea was not voluntary because he was not advised of the consequences of registering as a sex

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<sup>1</sup> MCL 750.335a(2)(b).

<sup>2</sup> *Id.*

<sup>3</sup> MCL 769.10.

<sup>4</sup> MCL 769.12.

<sup>5</sup> MCL 28.721 *et seq.*

offender under SORA. Specifically, Bardwell argued that defense counsel was ineffective for failing to inform him that registering as a sex offender would preclude him from receiving public healthcare benefits in Illinois. Based on Bardwell's testimony at the sentencing hearing, it appears that he had lived in Illinois, but at the time of sentencing was living with his mother in Michigan. Bardwell indicated that he wanted to return to Illinois and complete his probation. Bardwell was evaluated by the Illinois Department on Aging, which found that he required supportive living facility services. Because of his status as a sex offender, Bardwell was disqualified from living in a public supportive living facility and from receiving public nursing home care. The trial court found that defense counsel should have informed Bardwell of this consequence and granted Bardwell's petition.

The People argue that the trial court abused its discretion when it granted Bardwell's petition to withdraw his guilty plea. We agree. "There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court."<sup>6</sup> The trial court's decision to grant defendant's motion to withdraw his plea after sentencing is within the "sound discretion of the trial court."<sup>7</sup> Thus, "the trial court's decision will not be disturbed unless there is a clear abuse of discretion resulting in a miscarriage of justice."<sup>8</sup>

"A claim of ineffective assistance is a mixed question of law and fact."<sup>9</sup> This Court reviews findings of fact for clear error and constitutional questions de novo.<sup>10</sup> "To establish ineffective assistance of counsel in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly."<sup>11</sup> "Defense counsel's advice does not need to be correct, but it must fall within the range of competence demanded of attorneys in criminal cases."<sup>12</sup>

In *Padilla*, on which Bardwell relies, the Supreme Court held that defense counsel's performance was deficient when counsel failed to advise his client that his guilty plea made him subject to automatic deportation.<sup>13</sup> The *Padilla* Court noted that "because of its close connection to the criminal process," "[d]eportation as a consequence of a criminal conviction is . . . uniquely difficult to classify as either a direct or collateral consequence."<sup>14</sup> The majority held that

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<sup>6</sup> *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

<sup>7</sup> *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006).

<sup>8</sup> *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997).

<sup>9</sup> *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

<sup>10</sup> *Id.*

<sup>11</sup> *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995).

<sup>12</sup> *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), *aff'd* 463 Mich 446 (2000).

<sup>13</sup> *Padilla v Kentucky*, 559 US \_\_; 130 S Ct 1473, 1486; 176 L Ed 2d 284 (2010).

<sup>14</sup> *Id.* at 1482.

“constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation.”<sup>15</sup>

The defendant in *Fonville* relied on *Padilla* in support of his assertion that defense counsel’s failure to advise him that sex offender registration was a consequence of pleading guilty to child enticement constituted ineffective assistance.<sup>16</sup> This Court articulated the applicable case law which provides that:

[F]or purposes of determining whether defense counsel was effective[,] a defendant need only be made aware of the direct consequences of a guilty plea. A defendant’s ignorance of the collateral consequences of a plea does not render the plea involuntary. Counsel’s failure to properly advise of collateral consequences of a plea does not bear on whether a defendant properly understood the decision to plead guilty to the charges in question.<sup>17</sup>

This Court found that while deportation and sex offender registration are “difficult to classify as direct or [] collateral,”<sup>18</sup> counsel is required to advise a defendant of these consequences.<sup>19</sup> Counsel, however, is not required to advise a defendant regarding a “disqualification from public benefits,” as it is a collateral or incidental consequence of a guilty plea.<sup>20</sup>

Defense counsel here was not ineffective for failing to inform Bardwell that his status as a sex offender precluded him from receiving public healthcare benefits in Illinois. Disqualification from public benefits is a collateral consequence that counsel does not have to inform Bardwell of because it does not bear on his understanding of the plea.<sup>21</sup> Further, public health benefits are not “intimately related to the criminal process” so it is not difficult “to divorce the penalty from the conviction.”<sup>22</sup> Unlike the sex offender registration requirement, denial of public health benefits is not an “automatic result” of Bardwell’s guilty plea.<sup>23</sup> Because failure to

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<sup>15</sup> *Id.* at 1478.

<sup>16</sup> *People v Fonville*, 291 Mich App 363, 382; 804 NW2d 878 (2011).

<sup>17</sup> *Id.* at 385, quoting *Davidovich*, 238 Mich App at 428 (emphasis omitted).

<sup>18</sup> *Fonville*, 291 Mich App at 391.

<sup>19</sup> *Padilla*, 130 S Ct at 1486; *Fonville*, 291 Mich App at 392.

<sup>20</sup> *Id.* at 385.

<sup>21</sup> *Id.*; *Davidovich*, 238 Mich App at 425.

<sup>22</sup> *Padilla*, 130 S Ct at 1481.

<sup>23</sup> *Fonville*, 291 Mich App at 392.

advise Bardwell of a denial of public benefits is not appropriate grounds for an ineffective assistance of counsel claim, the trial court abused its discretion by granting his petition.<sup>24</sup>

Reversed and remanded for reinstatement of Bardwell's plea-based conviction and sentence. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ Michael J. Talbot  
/s/ Patrick M. Meter

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<sup>24</sup> *Ovalle*, 222 Mich App at 465.